APPEAL NO. 93333

This appeal arises under the Texas Workers' Compensation Act, TEX REV. CIV. STAT. ANN. art. 8303-1.01 *et seq.* (Vernon Supp. 1993) (1989 Act). A contested case hearing was held in (city), Texas, on March 17, 1993, (hearing officer) presiding. The hearing officer held that the respondent (claimant herein) suffered a compensable injury which resulted in disability. The hearing officer also found that the appellant (carrier herein) was not relieved of liability because the injury was not due to horseplay, was not due to the claimant's willful attempt to injure another individual, and was not the result of the act of a third person for personal reasons unrelated to employment.

The carrier appeals contending a number of the findings of the hearing officer are supported by insufficient evidence, but does not challenge the determination on disability. The carrier also contends that as a matter of law the claimant's injury was outside the course and scope of his employment. The claimant filed no response to the carrier's appeal.

DECISION

Finding sufficient evidence to support the decision and order of the hearing officer, we affirm.

The claimant was hired in September 1991 by the employer. He worked primarily as a production worker, but sometimes would work packing orders. On December 11, 1992, the claimant was assigned with two other employees--(P) and (C)--to complete packing a rush order. The present case is based upon allegations by the claimant of injuries resulting from a fight with P.

The claimant testified that P was not performing his job properly and slowing the completion of the job. The claimant stated when P, who smelled of alcohol, fell over boxes while "stretch wrapping," the claimant went to their supervisor, (LB), to report that P was not doing his job and might be drunk. The claimant said that LB came to the area in which P, C, and the claimant were working and spoke to P. The claimant testified that after LB had spoken to P, and had left the work area, P pushed and threatened him whereupon the claimant again reported P to LB. The claimant said that LB again spoke to P, and afterwards P said to the claimant, "you told the man on me," and hit the claimant in the face with a tape gun. Claimant describes falling to the floor after which P kicked him repeatedly in the face. Claimant testified that he picked up the tape gun and hit P with it once to defend himself from P's attack.

Two signed statements from C were admitted into evidence. She states that P was doing a job that required him to walk around in circles to wrap boxes, and he became dizzy and fell down. C relates that the claimant made a comment about P's falling, and P then made a scatological remark concerning the claimant after which the two men exchanged heated words. According to C, the claimant had gone to the office and brought LB back to the work area, and LB told the two men to "chill or something to that effect." C said that

after LB left the area the claimant and P had an additional exchange of words whereupon P hit the claimant with his fist. C then describes the claimant picking up a tape gun and hitting P in the head with it. C did not think P was drunk.

LB testified both live and by written statement. LB said that five minutes before the fight, the claimant came to him and stated that P was "messing with him" and indicated that unless LB did something he would shoot P. LB does not recall the claimant telling him that P was drunk. LB stated that he spoke to both the claimant and P, after which the claimant again threatened to shoot P. LB said as he turned away he saw P swinging at the claimant. LB testified that the claimant then picked up the tape gun and hit P in the back of the head with it six or seven times whereupon a violent physical struggle between the two men ensued. LB said he was unable to break up the fight himself, but with the help of (SW), the employer's general manager, he was able to do so. LB states that he did not smell alcohol on P and had no other reason to believe that P was intoxicated.

SW testified that when he arrived at the scene of the fight, the claimant and P were wrestling on the floor with blood everywhere. SW stated he held P while LB held the claimant. SW sent the claimant to the hospital and fired P for drinking at work and fighting. SW conducted an investigation as to what had happened and concluded that the claimant should also be fired for fighting, as he came to believe that the claimant was partly responsible for the fight. SW testified that "stretch wrapping" boxes required walking around in circles and could make one dizzy, that he could smell alcohol on P's breath when he was holding him to break up the fight, and that LB told him that before the fight claimant reported to LB that P had been drinking.

Article 8308-3.02 of the 1989 Act states in relevant part:

An insurance carrier is not liable for compensation if:

* * * * *

(2)the injury was caused by the employee's wilful intention and attempt to injure himself or to unlawfully injure another person;

(3)the employee's horseplay was a producing cause of the injury;

(4)the injury arose out of an act of a third person intended to injure the employee because of personal reasons and not directed at the employee as an employee or because of the employment; . . .

The carrier contends that all three of the exceptions to liability found in Article 8308-3.02 apply to the present case. First, the carrier asserts that the claimant's original

comment to P upon his falling down constituted horseplay which initiated his altercation with P resulting in the fight between them and claimant's injuries. Second, the carrier contends that P's attack was motivated by the claimant's comments to him and thus constituted an intentional act of a third person to injure the claimant for personal reasons not related to employment. Finally, it is the carrier's position that the claimant's response to being initially struck by P constituted retaliation beyond lawful self-defense and consequently an unlawful and intentional attempt to injure another which caused the claimant's injuries.

The hearing officer found that the claimant was not engaged in horseplay with P either prior to the altercation or to the claimant's subsequent injuries. The hearing officer found that P initiated the altercation when he struck claimant in the face and that the reason P struck the claimant was because he became angry with the claimant for having reported P to a supervisor for not doing his job and for being intoxicated. Finally, the hearing officer found that claimant only tried to injure P in self defense after P had initiated the fight.

Each of these issues--horseplay, intentional act of a third person, and intentional act by claimant to injure another--turns on factual determinations. *See* Texas Workers' Compensation Commission Appeal No. 93013, decided February 16, 1993; Texas Workers' Compensation Commission Appeal No. 91070, decided December 19, 1991. The real questions here are who started the fight, why it started, and whether the claimant intentionally attempted to injure P or was acting in self-defense. The carrier cites testimony which supports its theory of the case and argues that contrary evidence should be ignored or discounted because it is either contradicted or because the credibility of its source, particularly the claimant, was successfully impeached.

The hearing officer is the sole judge of the relevance and materiality of the evidence offered and of the weight and credibility to be given to the evidence. Article 8308-6.34(e). As the trier of fact, the hearing officer resolves conflicts and inconsistencies in the testimony, Garza v. Commercial Insurance Co. of Newark, N.J., 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ), and may believe all or part or none of the testimony of any one witness, Taylor v. Lewis, 553 S.W.2d 153 (Tex. Civ. App.-Amarillo 1977, writ ref'd n.r.e.). The decision of the hearing officer will be set aside only if the evidence supporting the hearing officer's determination is so weak or against the overwhelming weight of the evidence as to be clearly wrong or manifestly unjust. Atlantic Mutual Insurance Co. v. Middleman, 661 S.W.2d 182 (Tex. App.-San Antonio 1983, writ ref'd n.r.e.). Under this standard of review, we must find that the hearing officer's findings were supported by sufficient evidence.

Finally, the carrier contends that the claimant was outside the course and scope of employment because he violated a company rule by fighting on the job. We have held that whether an injury resulting from an assault occurred in the course and scope of employment is generally a question of fact. Texas Workers' Compensation Commission Appeal No.

92367, decided September 11, 1992. In fact that a claimant violated a rule or express direction at the time of injury does not, as a matter of law, establish the injury as one occurring during a deviation from employment. Westchester Fire Insurance Co. v. Wendeborn, 559 S.W.2d 108 (Tex Civ. App.-Eastland 1977, writ ref'd n.r.e.). The record was never well developed on this point. The only evidence in the record of any violation of policy was the testimony of SW that after his investigation he determined to discharge the claimant because it was apparently his conclusion that the claimant was partly responsible for the fight. While this presents some evidence of misconduct, the hearing officer is not bound to accept it and apparently did not by finding that the claimant acted only in self-defense. We will not set this factual finding of the hearing officer aside under the same rationale as stated earlier for his other factual findings. Further, the claimant is justified in using the degree of force he reasonably believed necessary to protect himself. *See* Appeal No. 91070, *supra*; Diaz v. Deavers, 574 S.W.2d 602 (Tex. Civ. App.-Tyler 1978, writ dismissed).

For the foregoing reasons, the decision of the hearing officer is affirmed.

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Gary L. Kilgore
Appeals Judge

CONCUR:

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Philip F. O'Neill
Appeals Judge

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Thomas A. Knapp
Appeals Judge